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No. 93-156

In The

Supreme Court of the United States

October Term, 1993

MIRA SLOVAK AEROBATICS INC.,

Petitioner,

v.

CALIFORNIA STATE BOARD OF EQUALIZATION,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California In And For The Second Appellate District, Division Five

BRIEF OF RESPONDENT STATE BOARD OF EQUALIZATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does California's use tax as applied to lessors of Mobile Transportation Equipment impose an impermissible tax on the United States government as lessee?

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BRIEF OF RESPONDENT STATE BOARD OF EQUALIZATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent State Board of Equalization of the State of California ("the Board") respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the judgment and opinion of the California Court of Appeal, Second Appellate District, Division Five, after the California Supreme Court denied review on March 3, 1993.

STATUTORY PROVISIONS

Appendix "A" hereto contains the text of California Revenue and Taxation Code sections 6006, 6009, 6010, 6023, 6051, 6201, 6202, 6203, 6244(d).

SUPPLEMENTAL STATEMENT OF THE CASE[1]

The essential facts of this case as presented to the trial court were undisputed and set forth as stipulated facts; a copy of this stipulation is reproduced as Appendix "B" hereto. In summary, Mira Slovak Aerobatics ("Mira Slovak") is a corporation in the business of buying, selling and leasing airplanes. (Resp. App. B1-B2.)[2] Four airplanes, which are the subject of this refund action, were purchased by Mira Slovak and immediately leased to the United States government. The aircraft are mobile transportation equipment ("MTE") as defined by California Revenue and Taxation Code section 6023.[3] An audit of Mira Slovak's records in October 1987 by the State Board of Equalization ("the Board"), revealed a deficiency in use tax for the tax period of July 1, 1984 to June 30, 1987 for a total of $51,442.68. This assessment was based on the purchase price paid by Mira Slovak for

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[1] Pursuant to Rule 15 of this Court, respondent Board states that it does not agree with some of the petitioner's abbreviated Statement of Case.

[2] Respondent's Appendix "B" is hereinafter cited as "Resp. App."

[3] All code references shall be to the California Revenue and Taxation Code unless otherwise indicated.

four aircraft, because Mira Slovak did not choose the election, provided by Revenue and Taxation Code section 6244(d), to use the fair rental value as a measure of the use tax liability. (Resp. App. B2-B3.) This use tax is the subject of this refund action by Mira Slovak.

There is no indication in the record that Mira Slovak was actually reimbursed by the federal government for the use tax in question. (See Resp. App. B4-B5.) Consequently, the United States did not bear the economic burden of this tax.

Petitioner's Statement of Facts (Pet. 9-13) includes some purportedly stipulated facts which were never agreed to by the parties. It was stipulated that the aircraft in question are mobile transportation equipment within the meaning of section 6023 of the Revenue and Taxation Code (Pet. 10), but contrary to the petitioner's representation, there was no stipulation that mobile transportation equipment "as such incur no sales tax when purchased." There also was no stipulation that "United States government pilots took possession of these airplanes." (Pet. 10.) In addition, contrary to the petitioner's representation, there was no stipulation that "the case rested entirely on an issue of Constitutional Law." (Pet. 13.) (See Resp. App. B1-B5.) The significance of these misstatements demonstrates that the petitioner still does not understand how the California scheme of taxation on MTE works.

Resolution of this case does not rest entirely on constitutional law; rather, it rests on a full understanding of California's scheme of taxation on mobile transportation equipment. The conclusion of the trial court and the Court of Appeal, that the incidence of this tax rests on

Mira Slovak and not the federal government, is based on a clear and correct discernment of California's method of taxing mobile transportation equipment. Once that determination has been made, the application of constitutional law principles leads without question to a conclusion that there has been no violation of the Constitution in this case.

ARGUMENT

I.

THE CALIFORNIA TAX REGARDING LEASED MOBILE TRANSPORTATION EQUIPMENT IS A USE TAX SOLELY UPON THE LESSOR

The sales tax in California is an excise tax on the privilege of selling tangible property at retail.[4] Its complementary tax, the use tax, is a similar type of tax generally imposed on the use or consumption of such property where the acquisition of the property by the user or consumer was for certain reasons not subject to the sales tax.[5] Although the use tax is imposed upon the user or consumer, generally speaking the retailer is authorized and required to collect the use tax from the purchaser or user.[6]

By statutory definition, Revenue and Taxation Code § 6006 states that most leases are sales and purchases.

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[4] See Revenue and Taxation Code § 6051.

[5] See Revenue and Taxation Code §§ 6201 and 6202.

[6] See Revenue and Taxation Code § 6203.

Listed as one of the exceptions to this general rule is the leasing of MTE.[7] Thus the use, through leasing, of such equipment by an individual or a business entity engaged in the business of leasing equipment is taxed through a use tax, and the receipts from the subsequent leasing of the equipment are exempt from further taxation. Section 6202 provides that the consumer of tangible personal property purchased in this state is liable for use tax except where the retailer collects the tax from the consumer and the consumer has a receipt so indicating. The taxable event is the use of the property; the statutory definition of use includes the owner's (lessor's) use of the property by means of leasing it.[8] Thus the taxable event occurs when the owner first leases the property, because the lease constitutes the owner's exercise of a right of ownership over the property.

In the case before this Court, the aircraft in question are MTE which were leased to the United States government. These leases are not sales by the lessor or uses by the lessee, but uses by the lessor. According to sections 6006 and 6010, leases of MTE are neither sales nor purchases, therefore the leases are uses by the lessor. Since the lessor is the consumer, the lessor in this case, Mira Slovak, is liable for the tax under section 6202. The planes were purchased by Mira Slovak ex-tax, without paying

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[7] Revenue and Taxation Code § 6023 defines MTE as follows: "Mobile transportation equipment includes equipment such as railroad cars and locomotives, buses . . . aircraft and ships, and tangible personal property which is or becomes a component part of such equipment . . . ."

[8] See Revenue and Taxation Code § 6009.

sales tax reimbursement to the vendor or use tax to the state. (Resp. App. B3-B4.) Therefore, the use[9] in this case – the leasing of the airplane to the government – is the taxable event, with the tax payable being based on either the purchase price or the total fair rental value at the election of the lessor, Mira Slovak. Here there was no election; thus the tax was based on the purchase price paid by Mira Slovak.[10] The use tax in question was due from Mira Slovak to the Board because of the manner in which MTE is taxed in California.

II.

THIS COURT'S RECENT PRECEDENTS FULLY SUPPORT THE CALIFORNIA HOLDING THAT APPLICATION OF THE USE TAX TO MIRA SLOVAK WAS CONSTITUTIONAL.

In *United States* v. *New Mexico*, 455 U.S. 720, 102 S.Ct. 1371, 71 L.Ed.2d 580 (1982), this Court recognized the constitutionality of a state tax which was imposed upon federal contractors, even though the economic burden of the tax was passed on to the United States. This Court held that the contractors, as independent taxable entities, are not protected by the Constitution's guarantee of federal supremacy, and are subject to the state taxes in question. The contractors used an advance funding procedure to meet the contractors' costs, by which both their creditors and their employees were paid with United States Treasury funds; only federal funds were expended

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[9] See Revenue and Taxation Code § 6009.

[10] See Revenue and Taxation Code § 6244(d); (Resp. App. B3.)

on the contractors' obligations. Despite this close relationship, this Court did not find federal immunity from taxation.

Most recently this Court reaffirmed the *United States* v. *New Mexico* rule in *United States* v. *California*, ___ U.S. ___, 113 S.Ct. 1784, 123 L. Ed.2d 528 (1993), and addressed the issue of sovereign immunity from state taxation. The facts in that case involved United States contracts with Williams Brothers Engineering Company ("WBEC") to manage oil drilling operations on federal land in California. The contracts provided that the United States would reimburse (or fund in advance) the contractor for costs, which included state taxes. The State Board of Equalization assessed $14 million dollars in sales and use taxes against WBEC for the years 1975 through 1981. The United States filed suit seeking declaratory relief that California had erroneously applied California law in classifying and taxing the engineering company as a construction contractor.

This Court asserted that the limits of the immunity doctrine are as significant as the rule itself and that California did not tax the federal government under these facts. Immunity is not conferred because a tax is paid with funds of the federal government. "Tax immunity is 'appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities.' " (*United States* v. *California*, *Id.* at 1789, quoting *United States* v. *New Mexico*, *supra*, 455 U.S. 720, 735.) With this in mind, this Court held that even though the federal government had in effect contractually indemnified

WBEC's tax liability, the federal government's sovereign immunity did not immunize WBEC from state taxation.

This Court in *United States* v. *California, supra,* 113 S.Ct. 1784, further clarifies sovereign immunity in tax cases by stating:

> "In *United States* v. *New Mexico,* we held that the Federal Government is immune only from state taxes imposed on it directly. [Citation.] In so holding, we hoped to 'forestall, at least to a degree, some of the manipulation and wooden formalism that occasionally have marked tax litigation – and have no proper place in determining the allocation of power between co-existing sovereignties.' " *Id.* at 1792, quoting *United States* v. *New Mexico, supra,* 455 U.S. 720, 737.

In the case now before this Court, it has not been demonstrated nor asserted that Mira Slovak is so closely connected with the United States government, that Mira Slovak can realistically be viewed as a part of the government or that the two cannot be viewed as separate entities insofar as the activity being taxed is concerned. In addition, there is no evidence that the tax imposed on the four airplanes was a tax directly (or, under the facts of this case, even indirectly) on the United States.[11] In this

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[11] *U.S.* v. *Cal. State Bd. of Equalization,* 650 F.2d 1127 (9th Cir. 1981), is mistakenly relied upon by petitioner. That decision, decided before this Court's decision in *United States* v. *New Mexico,* was based upon California sales tax provisions which manifested a legislative intent that the lessee pay the sales tax when the sales tax applied. 650 F.2d at 1131-32. No such provisions apply to Mira Slovak's lease transactions involving MTE,

Court's prior decisions in this area, it was established that the United States bore the economic burden of the state taxes. There is no such evidence in the present case. Thus taxpayer Mira Slovak does not even have the colorable argument which was presented by the taxpayers in the prior cases.

III.

CALIFORNIA'S USE TAX DOES NOT DISCRIMINATE AGAINST BUSINESSES THAT LEASE MOBILE TRANSPORTATION EQUIPMENT TO THE UNITED STATES GOVERNMENT

Petitioner argues that the MTE taxation scheme discriminates against businesses that lease mobile transportation equipment to the United States government. Petitioner gives no meaningful explanation of how this tax discriminates against these businesses. The MTE taxing scheme does not treat leases to the government differently from other leases, and therefore there can be no discrimination.

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which involve only the use tax. In fact, the 1981 Ninth Circuit opinion clearly is consistent with the California Court of Appeal decision in the current case, for the Ninth Circuit specifically recognized that "there is no constitutional violation if the state levies a tax on a lessor to the United States and the lessor recoups this tax payment by raising the lease price – increasing the economic burden – to the United States. [Citations.]" *Id.* at 1131.

CONCLUSION

This case does not present an important question of federal law nor any conflict with prior decisions of this Court. After a careful review of the California taxing scheme on mobile transportation equipment and an examination of the law regarding tax immunity, it is clear that petitioner's arguments are unfounded.

As this Court ruled in the *New Mexico* case and reaffirmed last term in *United States* v. *California*, tax immunity is only appropriate when the state tax levy falls on the United States itself, or on an agency or instrumentality that stands in the government's shoes. Here the tax levied on the four airplanes was levied on Mira Slovak, not the United States; Mira Slovak and the government are separate entities for tax purposes. Since there is no reason to grant this petition, respondent Board respectfully requests that the Petition for a Writ of Certiorari be denied.

Dated: August 19, 1993.

Respectfully submitted,

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APPENDIX "B"

Stiplulation of Facts B1

* * *

§ 6006. Sale

"Sale" means and includes:

(a) Any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. "Transfer of possession" includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter.

(b) The producing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting.

(c) The furnishing and distributing of tangible personal property for a consideration by social clubs and fraternal organizations to their members or others.

(d) The furnishing, preparing, or serving for a consideration of food, meals, or drinks.

(e) A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price.

(f) A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer, or of any publication.

(g) Any lease of tangible personal property in any manner or by any means whatsoever, for a consideration, except a lease of:

(1) Motion pictures or animated motion pictures, including television, films, and tapes.

(2) Linen supplies and similar articles when an essential part of the lease agreement is the furnishing of the recurring service of laundering or cleaning the articles.

(3) Household furnishings with a lease of the living quarters in which they are to be used.

(4) Mobile transportation equipment for use in transportation of persons or property as defined in Section 6023.

(5) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor, as to which the lessor or transferor has paid sales tax reimbursement or has paid use tax measured by the purchase price of the property. For purposes of this paragraph, "transferor" shall mean the following:

(A) A person from whom the lessor acquired the property in a transaction described in subdivision (b) of Section 6006.5.

(B) A decedent from whom the lessor acquired the property by will or the laws of succession.

(6) A mobilehome, as defined in Sections 18008 and 18211 of the Health and Safety Code, other than a mobilehome originally sold new prior to July 1, 1980, and not subject to local property taxation.

(7) Paragraphs (1) and (5) and Section 6094.1 shall not apply to rentals or leases of video cassettes, video

tapes, and video discs for private use under which the lessee or renter does not obtain or acquire the right to license, broadcast, exhibit, or reproduce the video cassette, video tape, or video disc.

* * *

§ 6009. Use

"Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business.

* * *

§ 6010. Purchase

"Purchase" means and includes:

(a) Any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. "Transfer or possession" includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter.

(b) When performed outside this state or when the customer gives a resale certificate pursuant to Article 3 (commencing with Section 6091) of Chapter 2, the producing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the

materials used in the producing, fabricating, processing, printing, or imprinting.

(c) A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price.

(d) A transfer for a consideration of tangible personal property which has been produced, fabricated, or printed to the special order of the customer, or of any publication.

(e) Any lease of tangible personal property in any manner or by any means whatsoever, for consideration, except a lease of:

(1) Motion pictures or animated motion pictures, including television, films, and tapes.

(2) Linen supplies and similar articles when an essential part of the lease agreement is the furnishing of the recurring service of laundering or cleaning the articles.

(3) Household furnishings with a lease of the living quarters in which they are to be used.

(4) Mobile transportation equipment for use in transportation of persons or property as defined in Section 6023.

(5) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor, as to which the lessor or transferor has paid sales tax reimbursement or has paid use tax measured by the

purchase price of the property. For purposes of this paragraph, "transferor" shall mean the following:

(A) A person from whom the lessor acquired the property in a transaction described in subdivision (b) of Section 6006.5.

(B) A decedent from whom the lessor acquired the property by will or the laws of succession.

(6) A mobilehome, as defined in Sections 18008 and 18211 of the Health and Safety Code, other than a mobilehome originally sold new prior to July 1, 1980, and not subject to local property taxation.

(7) Paragraphs (1) and (5) and Section 6094.1 shall not apply to rentals or leases of video cassettes, video tapes, and video discs for private use under which the lessee or renter does not obtain or acquire the right to license, broadcast, exhibit, or reproduce the video cassette, video tape, or video disc.

* * *

§ 6023. Mobile transportation equipment

"Mobile transportation equipment" includes equipment such as railroad cars and locomotives, buses, trucks (except "one-way rental trucks"), truck tractors, truck trailers, dollies, bogies, chassis, reusable cargo shipping containers, aircraft and ships, and tangible personal property which is or becomes a component part of such equipment. "Mobile transportation equipment" does not include passenger vehicles as defined in Section 465 of the Vehicle Code, trailers and baggage containers designed for hauling by passenger vehicles, or "one-way

rental trucks" as defined and identified pursuant to Section 6024.

* * *

§ 6051. Levy on retailers' gross receipts; rate

For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1, 1967, and to and including June 30, 1972, and at the rate of 3¾ percent on and after July 1, 1972, and to and including June 30, 1973, and at the rate of 4¾ percent on and after July 1, 1973, and to and including September 30, 1973 and at the rate of 3¾ percent on and after October 1, 1973, and to and including March 31, 1974, and at the rate of 4¾ percent thereafter.

* * *

§ 6201. Levy; rate

An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this state at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943,

and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1, 1967, and to and including June 30, 1972, and at the rate of 3¾ percent on and after July 1, 1972, and to and including June 30, 1973, and at the rate of 4¾ percent on and after July 1, 1973, and to and including September 30, 1973, and at the rate of 3¾ percent on and after October 1, 1973, and to and including March 31, 1974, and at the rate of 4¾ percent thereafter.

* * *

§ 6202. Liability for tax; extinguishment

Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State except that a receipt from a retailer engaged in business in this State or from a retailer who is authorized by the board, under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this part relating to the use tax, regarded as a retailer engaged in business in this State, given to the purchaser pursuant to Section 6203, is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

* * *

§ 6203. Collection by retailer from purchaser; receipt

Except as provided by Sections 6292 and 6293, every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapter

3.5 (commencing with Section 6271) or Chapter 4 (commencing with Section 6351), shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease.

"Retailer engaged in business in this state" as used in this and the preceding section means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

(b) Any retailer having any representative, agent, salesperson, canvasser, independent contractor, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property.

(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

(d) Any retailer soliciting orders for tangible personal property by means of a telecommunication or television shopping system (which utilizes toll free numbers) which is intended by the retailer to be broadcast by cable television or other means of broadcasting, to consumers located in this state.

(e) Any retailer who, pursuant to a contract with a broadcaster or publisher located in this state solicits orders for tangible personal property by means of advertising which is disseminated primarily to consumers located in this state and only secondarily to bordering jurisdictions.

(f) Any retailer soliciting orders for tangible personal property by mail if the solicitations are substantial and recurring and if the retailer benefits from any banking, financing, debt collection, telecommunication, or marketing activities occurring in this state or benefits from the location in this state of authorized installation, servicing, or repair facilities.

(g) Any retailer owned or controlled by the same interests which own or control any retailer engaged in business in the same or a similar line of business in this state.

(h) Any retailer having a franchisee or licensee operating under its trade name if the franchisee or licensee is required to collect the tax under this section.

(i) Any retailer who, pursuant to a contract with a cable television operator located in this state, solicits

orders for tangible personal property by means of advertising which is transmitted or distributed over a cable television system in this state.

(j) Notwithstanding Section 7262, a retailer specified in subdivision (d), (e), (f), (g), (h), or (i) above, and not specified in subdivision (a), (b), or (c) above, is a "retailer engaged in business in this state" for the purposes of this part and Part 1.5 (commencing with Section 7200) only.

* * *

§ 6244

* * *

(d) If the property is mobile transportation equipment as defined in Section 6023, and the use is limited to leasing the equipment, the purchaser may elect to pay his use tax measured by the fair rental value, if the election is made on or before the due date of a return for the period in which the equipment is first leased. The election must be made by reporting tax measured by the fair rental value on the return for that period, or in such other manner as the board may prescribe. Tax must thereafter be paid with the return for each reporting period, measured by the fair rental value, whether the equipment is within or without the state. The election may not be revoked with respect to the equipment as to which it is made.

* * *

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MIRA SLOVAK AVIATION, INC. Plaintiff, v. STATE BOARD OF EQUALIZATION, Defendant.	Case No. C 758 135 STIPULATION OF FACTS

MIRA SLOVAK AEROBATICS, INC., DBA MIRA SLOVAK AVIATION, PLAINTIFF, AND DEFENDANT, STATE BOARD OF EQUALIZATION, HEREBY STIPULATE TO THE FOLLOWING FACTS FOR PURPOSES OF THE ABOVE ENTITLED LITIGATION:

1. Mira Slovak Aerobatics, Inc. dba Mira Slovak Aviation ("Aviation") is a corporation duly formed and existent pursuant to California law.

2. Aviation purchased seven airplanes, hereinafter listed, for the specific purpose and intent of leasing said airplanes.

3. These airplanes are listed by identification number with their purchase price as follows:

Aircraft	**Purchase Price**
N4497U	$150,250
N32PV	$150,250
N39278	$146,972
N3832K	$162,500
N44956	$185,136
N33PV	$150,250
N44951	$150,250

4. Aviation is in the business of buying, selling and leasing airplanes. Four of the seven airplanes, specifically N4497U, N32PV, N39278 and N3832K were delivered and leased in California. Under California law airplanes are mobile transportation equipment ("MTE") as defined by California Revenue and Taxation Code, Section 6023.

5. The seven airplanes were purchased and six of the seven were immediately leased to the United States Government. Four of the seven airplanes i.e., N4497U, N32PV, N39278 and N3832K were either delivered or used in the State of California. Two of these seven airplanes, i.e., N33PV and N44951 were purchased and immediately leased to the United States Government, being delivered and operated exclusively outside of the State of California. One of the airplanes, i.e., N44956 was purchased and leased to the State of New Mexico. The

first functional use of six of the airplanes, i.e., N4497U, N32PV, N39278, N3832K, N33PV, and N44951 was by the United States Government. The first functional use of one of the airplanes, i.e., N44956 was by the State of New Mexico.

6. On or about October 1987, Defendant, State Board of Equalization ("the Board") audited the records of Plaintiff, Mira Slovak Aerobatics, Inc. and sent Plaintiff a Notice of Determination under the sales and use tax law, dated August 19, 1988, stating that a deficiency in sales and use tax in the amount of $36,598.32 and interest in the amount of $14,447.88 as of August 19, 1988, was due, for the period commencing July 1, 1984 and ending June 30, 1987 for the four airplanes which were operated in California.

a. This assessment was based upon the purchase price paid by Plaintiff for the following four aircraft: N4497U; N32PV; N39278; and N3832K. No use tax was assessed on three of the aircraft because they were either delivered to the United States Government or to the State of New Mexico outside of the State of California for use outside of the State of California.

b. Aviation did not elect to use the fair rental value as the measure of the sales/use tax liability.

7. On September 16, 1988, Plaintiff timely filed a Petition for Redetermination with the Defendant requesting a hearing.

8. On January 23, 1989, a hearing officer of the Board conducted a hearing on Aviation's Petition for Redetermination.

9. On February 24, 1989 the hearing officer issued a Decision and Recommendation denying the Petition for Redetermination. Thereafter, Plaintiff requested an oral hearing by the Board.

10. On November 14, 1989 an oral hearing before the Board was held, where the Board adopted the Decision and Recommendation of the hearing officer and ordered the tax redetermined without adjustment.

11. On January 12, 1990 Defendant mailed a Notice of Redetermination to Plaintiff denying the Petition and assessing a deficiency based on the use of airplanes N4497U, N32PV, N39278 and N3832K in the amount as follows:

a. Deficiency in sales and use taxes for the period July 1, 1984 to June 30, 1987 of $36,598.32.

b. Interest on the deficiency from July 1, 1984 to August 31, 1988 of $14,844.36 for a total assessment of $51,442.68.

12. On September 16, 1988 Plaintiff paid $36,598.32 the amount of the tax to Defendant, Board. On October 6, 1988 Plaintiff paid $14,844.36 the amount of interest to Defendant. These payments constituted payment in full pursuant to the deficiency assessment.

13. On October 18, 1988 Plaintiff filed a claim for refund with Defendant in the amount of $51,442.68.

14. Defendant failed to act upon Plaintiff's claim for refund within six months, therefore Plaintiff is entitled to consider the claim as having been denied.

15. Neither the whole nor any portion of the amounts paid by Plaintiff as alleged above have been refunded to, or applied for the benefit of Plaintiff.

DATED: 1-8-91

LAW OFFICES OF LEONARD E. ARON

By: /s/ Leonard Aron
Leonard E. Aron, Esq.
Attorneys for Plaintiff

DATED: 1/10/91

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